

1 UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
2 CIVIL ACTION CASE NO. 2:08-CV-1567

DR. FADI CHAABAN; DR. SABINO R. TORRE, DR. :
CONSTANTINOS A. COSTEAS and DR. ANTHONY J. :
CASELLA, as Trustee of Diagnostic & Clinical :
Cardiology, P.A. Profit Sharing Plan, :
:
Plaintiffs, :
:
vs. :
:
DR. MARIO A. CRISCITO, :
:
Defendant. :

Tuesday, June 16, 2009

Deposition of BRIAN WARNOCK, VOLUME I, before
Nancy A. Miani, a Certified Court Reporter, License
No. XI00814, and a Notary Public of the State of New
Jersey at the offices of WITMAN, STADTMAUER, ESQS, 26
Columbia Turnpike, Florham Park, New Jersey, on
Tuesday, June 16, 2009, at 10 a.m.

MIANI COURT REPORTING
CERTIFIED COURT REPORTERS
1741 DANIEL COURT
WALL, NJ 07719
(732) 681-4776

1 A P P E A R A N C E S:

2 WITMAN, STADTMAUER, ESQS.
26 Columbia Turnpike
3 Florham Park, NJ 07932
By: STEPHEN M. CHARME, ESQ.
4 Attorneys for the Plaintiffs

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1120 Route 22 East
6 Bridgewater, NJ 08807
BY: STEVEN KERN, ESQ.
7 AND CHARLES H. NEWMAN, ESQ.
Attorneys for the Defendant

8
ALSO PRESENT:

9 Anthony Casella, M.D.

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10	Warnock-2	Nine Page Document from American Pension Corporation	30
11		Entitled "Money Purchase Retirement Plan"	
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13	Warnock-3	Seven Pages of Handwritten Notes	33
14	Warnock-4	Three Pages of Handwritten Notes	39
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16	Warnock-5	Two Pages of Handwritten Notes	45
17	Warnock-6	One-Page Handwritten Letter with Attached Typewritten Letter to Dr. Criscito dated 1/7/91 from Brian Warnock	50
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19	Warnock-7	Form 5500 for 1999, 18 Pages	54
20	Warnock-8	Form 5500 for 2000, 12 Pages	56
21	Warnock-9	One Pages of Handwritten Notes With Attached Three Pages of Typewritten Notes	57
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10	Warnock-17	Memo from Brian Warnock Dated 9/14/07 with Two Page Attachment	90
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16	Warnock-20	Two-Page Letter to Joy M. Mercer, Esq. From Brian Warnock dated 11/13/07	107
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1 LITIGATION SUPPORT

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3 DIRECTION NOT TO ANSWER

4 (None)

5

6 MOTION TO STRIKE

7 (None)

8

9 DOCUMENT REQUEST

10 (None)

11

12 EXHIBIT ANALYSIS

13 Original Exhibits Attached to Original
14 Transcript.

15 Copies of All Exhibits attached to
16 All Transcripts.

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1 B R I A N W A R N O C K,
2 American Pension Corporation, 1375 Plainfield Avenue,
3 Watchung, New Jersey, sworn.

4 DIRECT EXAMINATION BY MR. CHARME:

5 Q. Good morning, Mr. Warnock. My name is
6 Stephen Charmé. I represent the plaintiffs in the
7 lawsuit in which you were subpoenaed.

8 Are you represented by counsel today?

9 A. No.

10 Q. Okay. Are you aware that you have a
11 right to be represented by counsel?

12 A. Yeah.

13 Q. You've chosen --

14 A. I didn't --

15 Q. So you've chosen not to be represented by
16 counsel. Is that correct?

17 A. That's correct.

18 Q. Okay. Have you ever had your deposition
19 taken before?

20 A. Yes.

21 Q. How recently was the last time?

22 A. Maybe 2 or 3 years ago.

23 Q. What kind of case?

24 A. About 2 or 3 years ago. It was a case
25 involving work.

1 responsibilities are completely different. We are not
2 the plan administrator.

3 Q. What's the difference between the two?

4 A. Well, you look at the plan documents,
5 there's a whole list of requirements for the plan
6 administrator. The company is responsible for
7 administering the plan. We are assisting them by
8 providing third party administration services, doing
9 forms, preparing the forms for them to sign. We don't
10 sign it as plan administrator. There is a major
11 difference.

12 Q. If I'm looking at this correctly, this
13 form was signed, looks like on October 15th or so.

14 A. Yes.

15 Q. 2000, correct?

16 A. Yes, correct.

17 Q. The two signatures there appear to be
18 different from one another.

19 MR. CHARME: I object to the form.

20 Q. Can you explain why?

21 A. No, I cannot explain why.

22 Q. Do you know if both signatures were made
23 by Dr. Criscito?

24 A. I see his name typed there.

25 Q. By the time this document was prepared,

1 APC had in its files the year end statement from
2 Morgan Stanley for the year 1999, correct?

3 A. Year end statement of 1999. No, that is
4 not correct.

5 (There is a discussion off the record.)

6 Q. Did you have any statements for the year
7 2000 prior to the filing of this Form 5500?

8 A. Yes, we did. They didn't realize they
9 were in the file.

10 Q. What did you have?

11 A. We had monthly statements that were
12 coming in, starting, I believe it was March of 2000.

13 Q. When you looked at those statements, did
14 it suggest a discrepancy between what was reported on
15 Warnock-7 and what was most likely in the account at
16 the end of 1999?

17 MR. CHARME: I object to the form. At
18 what point in time?

19 A. That would be my question, too. At what
20 point in time? When we did this report, no, we had
21 not even looked at those pages at all.

22 Q. My question is had you looked at the
23 March statement and February statement from 2000,
24 would that have set off any kind of bells or whistles
25 or alarms in anybody's head concerning the accuracy of

1 the report which was ultimately filed in October of
2 2000?

3 MR. CHARME: I object to the form.

4 A. Well, for one thing, the statements would
5 have been in 2000, in our file for the year 2000,
6 which is how we keep our filing, so we would not have
7 even looked in that file when we were preparing the
8 1999 5500 forms.

9 Q. How about when you were preparing the
10 2000 5500 report, would you have that information
11 available to you then?

12 A. It was then in there, and it just was
13 overlooked. We did not even realize they were in the
14 file.

15 Q. If somebody had looked at it, would that
16 have, at a minimum, set off an inquiry as to a
17 possible discrepancy between the 1999 filing and the
18 true amount in the account?

19 A. Had it been looked at, yes, it would have
20 raised a question.

21 Q. When you started getting these
22 statements, did anyone inquire as to why you were
23 getting them or why you hadn't gotten them in the
24 past?

25 A. No, the statements come in from Morgan

1 Stanley, there's a stack of them that come in like
2 this for each month for each participant, and they
3 just get filed away. The reason we knew they were
4 getting these statements, they were coming in, because
5 they were getting, they had just set up these separate
6 accounts for the new employees, that's why we were
7 getting statements. We saw them come in, that's good,
8 we're getting them. No one looked at them.

9 Q. But you also got them for the commingled
10 account?

11 A. We did get them. We didn't know we were
12 getting them for the commingled account, but yes, we
13 did get them.

14 Q. Nobody was hiding them from anybody?

15 MR. CHARME: I object to the form.

16 A. They came to us.

17 Q. Let me put it to you this way: You had
18 all of the information you needed in your file by, at
19 the earliest, March of 2000, and certainly by the
20 beginning of 2001, had somebody looked, to realize
21 that there was probably an error or some discrepancy
22 in that 1999 5500 filing, correct?

23 A. Had we looked at the statement, the
24 December 31st, 2000 statement, then we would have, we
25 would have realized it was a mistake. We didn't look

1 at it. We never received them before, thought we were
2 only getting the new ones. Sounds easy to say, gee,
3 how did you miss that. We did. We have a
4 participant's report, we went through, here's the
5 guy's name, check, check, never even noticed there was
6 a pile of papers this thick, but, yes, had we looked
7 at it, had we realized it was in there, we had an
8 extra statement in there and that that was it, it
9 would have raised a question.

10 Q. The note on Warnock-7 is attached to the
11 statement from Morgan Stanley. Do you know which
12 statement that was?

13 MR. CHARME: Did you mean 17?

14 MR. KERN: Is this 17?

15 MR. CHARME: This is 7.

16 (There is a discussion off the record.)

17 Q. Look at Warnock-17.

18 A. Okay.

19 Q. You got it?

20 A. Yes.

21 Q. Do you know what statement that was, that
22 note was attached to?

23 A. That's the December 31st, 2000 statement,
24 we received that in January of 2001.

25 Q. Before filing the 2000 5500, correct?

1 A. Yes.

2 Q. And before filing the annual, before
3 preparing the annual reports, correct?

4 A. For 2000, yes.

5 Q. Is this your handwriting?

6 A. That's my handwriting.

7 Q. You say how could we miss that, correct?

8 A. Yeah.

9 Q. Why did you write "how could we miss
10 this"?

11 A. How could we miss this. Dr. Casella
12 found this in the file, and I said to Dominique, how
13 did we miss this.

14 Q. This was an important document?

15 A. Well, if we had found it, as your
16 questions previously were, it would have certainly set
17 off an alarm, yes.

18 Q. And whatever issues we're dealing with
19 today could possibly have been addressed and resolved
20 at that time?

21 MR. CHARME: I object to the form.

22 A. I certainly would have asked what's this,
23 you know.

24 Q. And I take it if you couldn't get
25 adequate or reasonable answers to your questions that

1 you would have raised in 2000, had you not missed this
2 document, you would have taken steps to let
3 appropriate people know that there was a problem,
4 correct?

5 A. If we were off seven million dollars,
6 yes. We wouldn't have just said, well, I guess that's
7 4,000 that went in by accident, yes. We're talking
8 about a difference.

9 Q. What would you have done, if you --

10 A. Well, I would have first -- well, I would
11 have asked Mario what's this. That's what I would
12 have done.

13 Q. And if you couldn't get adequate,
14 responsible responses, what would you have done?

15 A. If he had said mind your own business,
16 then I think I would have -- well, I'm sure I would
17 have gone to Dr. Casella and said something to him.

18 Q. Certainly, by this point in time, you had
19 all the information you needed had you looked at it to
20 initiate an inquiry in an attempt to resolve the
21 discrepancy between the information you received as to
22 the 1999 year end balance and the monies in the Morgan
23 Stanley account, correct?

24 A. If we had noticed this, we probably would
25 have raised the question.

1 Q. Probably --

2 A. Well, we would have, but unless we were
3 examining each statement, we wouldn't have asked the
4 question on January 1st, 2001, but when we were doing
5 the annual report, which would probably have been
6 October, 2001, at that point, we would have said
7 something is wrong here and we would have raised the
8 question, yes.

9 Q. No question about that, correct?

10 A. There's no question about that. We would
11 definitely have raised the question.

12 Q. Are you aware of any efforts by Dr.
13 Criscito to keep you from becoming aware of the
14 information on the statements that you received on the
15 commingled -- received from Morgan Stanley concerning
16 the commingled account?

17 A. I don't think it was his intention that
18 we receive these, but I don't know that. They did
19 stop coming. They didn't continue to come.

20 Q. But they came for a while, correct, for
21 about a year?

22 A. They came for about a year, and I think
23 -- I would have to check the file, but I have a
24 feeling that's the last one we got.

25 Q. When they stopped coming, did you inquire